Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTA),[1] through the undersigned and pursuant to Federal Communications Commission (FCC) Rules 1.415 and 1.419,[2] hereby submits its comments in response to the FCC's *Triennial Review Notice*[3] in the above-docketed proceeding. In the *Triennial Review Notice*, the FCC solicits comments on numerous issues related to its

[1] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA represents over 670 carrier members that provide a full array of voice, data and video services over wireline and wireless networks. USTA members support the concept of universal service, and its carrier members are leaders in the provision of advanced telecommunications services to American and international markets.
[2] 47 C.F.R. §§ 1.415 and 1.419.
[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 01-361, Notice of Proposed Rulemaking (rel. Dec. 20, 2001) (*Triennial Review Notice*).

application of Sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 (1996 Act)[4] as it undertakes a comprehensive evaluation of its unbundling rules.

SUMMARY

In these comments, USTA asserts the FCC should undertake to correct past deficiencies in its impairment analyses conducted pursuant to Section 251(d)(2). Heretofore, the FCC has failed to apply a meaningful limiting standard for UNEs in conducting that analysis. Further, the FCC should consider inter-modal competition and increased facilities-based competition, especially as to advanced services and broadband services, as limiting factors in applying a limiting standard for UNEs. As for specific UNEs, USTA believes that high capacity loops, dedicated transport, the high frequency portion of the loop and switching should be removed from the current UNE list.

DISCUSSION

The FCC's stated purpose for commencing this review now is "to ensure that our regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the 1996 Act in light of our experience over the last two years, advances in technology, and other developments in the markets for telecommunications services.[5]" In the last two years, the telecommunications industry has struggled to withstand an economic downturn that has affected virtually every carrier, manufacturer and information services provider. Difficult economic times, marked by decreased spending, decreased earnings and exceedingly limited access to investment capital, has put substantial stress on the

[4] 47 U.S.C. §§ 251(c)(3) and 251(d)(2).
[5] *Triennial Review Notice* at ¶1.

telecommunication industry, particularly on those companies that failed to successfully execute their business plans or whose business plans were flawed from the outset. The economy of the past two years, and its winnowing effect on the ranks of telecommunications service providers, is an important "other development" that must be recognized and considered as the FCC conducts its evaluation of the regulatory framework for UNEs.

It is evident from certain pre-filing public statements that some carriers will attempt to distract the FCC from conducting the careful evaluation that it seeks to undertake by blaming their shortcoming in the competitive marketplace on purported ILECs failures to comply with the FCC's current unbundling requirements. They will argue that more ILEC regulation is needed in order to open the local exchange market to competition. These commenting parties will downplay or ignore alternatives to ILEC UNEs that are readily available to them, including self-provisioning. They will ignore the substantial levels of intra-modal and inter-modal competition that exist for voice and data services, especially high-speed access to the Internet. They will petition the FCC to provide them with access to "facilities of convenience" at the expense of ILECs, ILEC shareholders and ILEC customers. The FCC must reject this plea and only place on the UNE list those facilities that satisfy a meaningful, limiting standard for UNEs. By requiring the demonstration of real, tangible impairment – and not simply inconvenience to the requesting carrier – before a facility is determined to be a UNE, the FCC will be able to overcome the deficiencies in the impairment analyses reflected in *the First Report and Order*[6] and the *UNE Remand Order*.[7]

[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*First Report and Order)*.
[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*).

The FCC has yet to establish a limiting standard for UNEs, as directed by the Supreme Court in *AT&T v. Iowa*.[8] Among other things, it has not adequately taken into account alternatives to ILEC UNEs, and it has given inappropriate consideration to factors such as cost, ubiquity and quality in its impairment analysis. As previously applied by the FCC, these factors do not aid in the creation of a meaningful limitation on unbundling. For that reasons, the FCC's impairment analysis was deficient. The FCC should not make the same mistake here. To the extent that the FCC considers other factors, those other factors must serve to create a meaningful limitation on unbundling. Further, while facilitating competition is a goal of the 1996 Act, the FCC mistakenly put the emphasis on maximizing the number of new entrants in the local market rather than on maximizing carrier investment in facilities and facilities-based competition. These shortcomings in the FCC's previous impairment analysis have resulted in there being a cloud over this proceeding -- USTA's appeal from the FCC's *UNE Remand Order*.[9] While USTA does not oppose the FCC developing a record on which to base a further review of its UNE list, it will be an exercise of little utility should the FCC again apply an impairment analysis that fails to incorporate a meaningful, limiting UNE standard.

Other factors cannot serve as a replacement for the statutorily required impairment test. Other factors used in the impairment analysis must serve to create a limiting standard on unbundling. Inter-modal competition is a limiting factor that the FCC should examine in making its unbundling determinations. By the FCC's own findings in recent reports on competition in the cable and wireless markets, it is clearly demonstrated that facilities-independent wireless and cable networks provide alternatives to ILEC voice and data services. Customers are substituting

[8] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 at 734.

[9] Oral argument was held in this appeal on March 7, 2002, in the United States Court of Appeals for the District of Columbia. USTA, its co-petitioner and the supporting intervenors have challenged the legal sufficiency of the FCC's

wireless service,[10] cable telephony and Internet telephony for traditional wireline local exchange service. Cable modem Internet access service surpasses DSL-based Internet access service by two to one. The existence of inter-modal competition should serve as a limiting factor on unbundling since the greater the unbundling requirement imposed upon ILECs, the greater the competitive disadvantage suffered by ILECs in relation to their inter-modal competitors. The telecommunications industry is at a point where the continued regulatory disparity among service providers providing substitutable and functionally equivalent communications services raises significant Fifth Amendment equal protection issues.[11]

Another limiting factor that should be considered in the FCC's unbundling determination is the increased importance of industry investment in redundant networks. It is in the national interest to have telecommunications policies that provide an incentive for increased facilities investment in order to maximize the viability of critical communications paths during natural disasters and national, regional or local emergencies. The 1996 Act was intended to facilitate meaningful, facilities-based competition, and this goal should be factored into the FCC's unbundling determination. Since at the heart of Section 706[12] is the goal of accelerating the deployment of advanced telecommunications capability to all Americans by removing barriers to infrastructure investment and promoting competition in the telecommunications market, furthering the goal of Section 706 should also serve as a limiting factor on unbundling.

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application of Section 251(d)(2) in the *UNE Remand Order*. A decision could be forthcoming by the end of June 2002.

[10] USA Today reported on 02/01/02 that almost one in five wireless phone users consider their wireless phones to be their primary phones. It is anticipated that the percentage will continue to grow over time.

[11] USTA is encouraged by the fact the FCC has several proceeding open that address the issue of regulatory parity for competing broadband platforms.

[12] 47 U.S.C. § 706.

Specific Network Elements

High-Capacity Loops

Alternative providers of high-capacity loops exist. Competitive carriers can, and do, provide high-capacity loops without access to ILEC high-capacity loops as UNEs, and without any impairment in their ability to provide services to their customers. CLECs have demonstrated an ability to expand their networks to serve customers where customer demand dictates in all markets. Moreover, wireless high-speed loops are available as an inexpensive alternative to providing business customers high-capacity loops through fiber to the building. Competitive carriers can economically self-provision, or gain access to third-party suppliers of high-capacity loops, without the cost of providing the service to their business customers impairing the CLEC's ability to provide competitive services. The quality of service and network reliability of competitive carriers providing high-capacity copper loops through self-provisioning, or purchase from non-ILEC providers, to business satisfies customer needs and expectations. Fixed wireless high-capacity loops provide greater capacity than copper loops with quality of service as good as standard copper loops. Therefore, there is no impairment under Section 251(d)(2) if high-capacity loops are not provided by ILECs as UNEs.[13]

High Frequency Portion of the Loop (Line Sharing)

There is no credible evidence refuting the conclusion that cable modem access to the Internet has a two-to-one market advantage over DSL access to the Internet. Cable is the dominant provider of high-speed access to the Internet. For the FCC to require ILECs to provide line sharing as a

[13] It seems appropriate to USTA that for some transitional period CLECs ought to have the ability to demonstrate, on an expedited basis, that the impairment standard can be met as to high-capacity loops and dedicated transport for a particular geographic segment of the local exchange market. The CLEC would bear the burden of demonstrating to the FCC that the impairment standard is met in that particular local exchange market for high-capacity loops or dedicated transport. Absent a showing, supported by evidence, that the CLEC would be impaired without access to the ILEC's high-capacity loops or dedicated transport on a UNE basis, the ILEC would continue to have no

UNE necessitates that the FCC disregard the Supreme Court's mandate that it consider alternatives outside of the ILEC's network when conducting its impairment analysis. Section 251(d)(2) does not limit the impairment analysis by technology or service platform. Section 251(d)(2) does not require that line sharing be found to be a UNE. Rather, the proper application of a limiting impairment standard requires the conclusion that line sharing not be a UNE. It must be considered a perverse outcome if a non-dominant provider of high-speed Internet access is required to provide its high-speed facility to other would be competitors in the high-speed Internet access market as a UNE, at TELRIC rates, while the dominant provider in the market is insulated from such sharing requirements and is also able to discriminate as to the Internet services providers permitted to connect to its high-speed facility. The FCC should reverse its decision requiring ILECs to provide line sharing as a UNE.

Switching

USTA continues to believe that there is no basis on which the FCC should require ILEC unbundling of local switching. Switches can serve large geographic areas. In some cases, they can serve areas within a 125 radius of the switch. The market for switches is very competitive and they are readily available. When USTA examines the availability of switches, the level of competition in the market for switches (which drives prices down), and the breadth of coverage available from switches, USTA believes that CLECs are not impaired in their ability to provide competitive local service without access to ILEC local switching as a UNE. Local switching should not be a UNE.

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obligation to provide those facilities as UNEs. It is important that this process be expeditious. USTA will work with the FCC to implement a procedure that is expeditious and fair to all involved.

Dedicated Transport

Alternative dedicated transport facilities are available from competitive carriers that either self-provision or obtain from third-party suppliers dedicated transport anywhere that the competitive carrier may need such facilities. The availability of non-ILEC dedicated transport facilities, competitive costs, and quality of service demonstrate the lack of impairment in the absence of ILEC dedicated transport being offered as a UNE. Competitive carriers are principally collocated in ILEC central offices. The FCC has concluded on the basis of collocated facilities in ILEC central offices by facilities-based CLECs that in some areas special access service is competitive. The ubiquity of alternative dedicated transport is also reflected in the growth of CLEC fiber networks. Competing carriers can connect to CLEC fiber rings that are connected to IXCs, ISPs, ILEC central office and commercial buildings thereby eliminating the need for CLECs to establish direct connections to every IXC POP or ILEC central office in order to provide service to a given location. Moreover, a number of wholesale providers have constructed fiber rings in different markets, that bypass ILEC facilities, with the stated purpose to provide advanced fiber transport services, including interoffice transport, throughout the Nation in all types of markets. Even where facilities have not been deployed, competitive carriers are not impaired in their ability to provide dedicated transport without access to ILEC dedicated transport facilities as a UNE. Cost also does not present an impairment issue. Because competitive carriers can concentrate their resources on wire centers that serve their customers, they are not required to replicate the entire ILEC interoffice network. Once the initial investment has been made to deploy fiber, the incremental cost to competitive carriers of deploying dedicated transport is extremely low, which enables CLECs to aggressively price their services. Timeliness and service quality do not present issues that rise to the level impairing a CLEC's

ability to provide service if ILECs are no longer required to provide dedicated transport as a UNE.

Respectfully submitted,

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